

FINAL STATEMENT OF REASONS

a) Specific Purpose of the Regulations and Factual Basis for Determination that Regulations Are NecessarySection 30-763.44Specific Purpose:

For consistency with Welfare and Institutions Code (WIC) section 12300(e) and the language in Section 30-763.45 (below), the following change was made to Section 30-763.44 "...who have a legal duty pursuant to the Family Code to provide for the care of his/her child..." In addition, "available" was added to explain that these regulations apply when no parent is "...able and available..." Language was also added to this section to further clarify that a non-parent provider can be paid only for In-Home Supportive Services (IHSS) that must be provided during the parent's absence.

Factual Basis:

The proposed language is necessary to be consistent with WIC section 12300(e) by addressing the statutory parental duty to provide services to their minor children. Additionally, "available" was added to be consistent with Departmental policy that services can only be purchased by a provider other than the parent when a parent is either unable or unavailable. Language was also added to emphasize the Department's policy that a non-parent provider can be paid only for IHSS services that must be provided during the parent's absence.

Final Modification:

As a result of testimony received, the California Department of Social Services (CDSS) decided to further amend this section for clarity by replacing "...IHSS tasks" with "...IHSS services..." and "...parent(s) absence..." with "...parent(s) inability and/or unavailability..." These amendments clarify that the parent must be unable and/or unavailable to provide the IHSS services instead of just be absent.

Section 30-763.441Specific Purpose:

The word "absent" was replaced with "unavailable" to define that this regulation takes effect when a parent is "unavailable." For example, if a parent works from home, the parent may not be absent; however, that parent may be unavailable due to their home employment. In

addition, language changes were made, but it does not affect the intent of this regulation. The proposed changes include correctly capitalizing the word at the start of each sentence.

Factual Basis:

In regards to parental duty to provide services to their minor children, the proposed regulation change is necessary to be consistent with WIC section 12300(e) which, in the Department's opinion, allows the purchase of supportive services for a child from a provider other than the parent, when the parent is unavailable to provide those services.

Section 30-763.442

Specific Purpose:

The proposed change replaces the word "perform" with "provide." This change will improve language consistency in this section; also, the first word of the section is capitalized.

Factual Basis:

The proposed change to the current regulation is necessary for language consistency in this regulation package and WIC section 12300(e).

Final Modification:

As a result of testimony received, CDSS decided to further amend this section to add "...IHSS" before services. This is a clarifying change and does not change the intention of this regulation.

30-763.443

Specific Purpose:

The first word of the section is capitalized and the language in this section was amended to provide consistency in the new regulation while clarifying that a parent must be "unavailable" instead of only "absent" due to medical, dental or other health-related treatment. This change will improve understanding that the parent may be present in the home, but unavailable to assist the recipient due to the reasons outlined in this regulation.

Factual Basis:

These changes are necessary to provide consistency and to clarify the Department's policy that a parent must be unavailable instead of only absent as a reason to allow a non-parent provider to be paid to provide services.

Section 30-763.444

Specific Purpose:

Section 30-763.444 was amended to accurately reflect the intent of the regulation. The current regulation is confusing and results in inconsistencies with program uniformity. The word "perform" was changed to "provide" for consistency with this regulatory section. In addition, "search for employment" was added as a reason that a non-parent provider may be authorized up to eight hours a week for IHSS services that must be provided to the minor recipient during parental absence. The proposed regulation provides clarity about the availability of IHSS during periods of parental absence for the reasons specified in this regulation.

Factual Basis:

These changes are necessary to provide consistent language in this regulation section and to be consistent with WIC section 12300(f) by allowing respite care to relieve persons who are providing care without compensation.

Final Modification:

As a result of testimony received, CDSS decided to further amend this section by replacing "...absent from the home..." with "...unavailable..." and "...absence..." with "...unavailability..." These are clarifying changes and do not change the intention of this regulation.

Section 30-763.45

Specific Purpose:

Section 30-763.45 was amended to specify that this regulation applies to parent(s) who have a legal duty under the Family Code to provide care for his/her child. In addition, Section 30-763.456 is referenced to provide direction concerning which services may be authorized for minors living with their parents. Changes made to this regulation provide improved direction to the counties concerning the IHSS role of parents and their obligations under the Family Code.

Factual Basis:

This change is necessary because the Family Code is not referenced in the current regulation, and the addition of this language will make the regulation consistent with WIC section 12300(e).

Sections 30-763.451 through .451(c)

Specific Purpose:

The regulation changes provide greater clarity and mirror statutory language of WIC section 12300(e). Current Sections 30-763.451, .451(a), .451(b), and .451(c) are combined into Section 30-763.451 to add clarity.

Factual Basis:

These changes are necessary to mirror the statutory language contained at WIC section 12300(e).

Final Modification:

As a result of testimony received, CDSS decided to further amend this section by replacing "...provider..." with "...parent..." This is a clarifying change and does not change the intention of this regulation.

New Section 30-763.451(a)

Specific Purpose:

There is no current regulation to specifically address when a parent is considered employed full-time for the purposes described in WIC section 12300(e). Amending the regulations to provide this definition will allow consistent application of 30-763.451. Also, included is "regardless of worksite location" due to questions and concerns from counties about parental employment from home.

Factual Basis:

The language is necessary to clarify full-time employment to be consistent with the Department's policy.

Final Modification:

As a result of further consideration, the Department decided to amend this section. This section is amended from "...average of 35 hours or more per week..." to "...average of 40 hours or more per week..." This modification will allow parents who are working an average of less than 40 hours per week due to the care needs of their child, to be potentially eligible to be the IHSS provider for their child. This modification will make this regulation consistent with Labor Code sections 510, 511 and 515(c), all of which refer to a 40 hour work week as full-time employment, and the intent of WIC 12300(e), which is to allow payment to parents who have had to forfeit full-time employment in order to care for their disabled child.

Second Final Modification:

As a result of testimony received on the 15-day renote, CDSS decided to further amend this section for clarity by specifying that a parent providing IHSS funded care to his or her own child is not full-time employment.

Section 30-763.452

Specific Purpose:

This section was amended to define both a suitable provider who does not have a legal duty pursuant to the Family Code and a provider who does have a legal duty pursuant to the Family Code. "Able" was added to further define persons who do not have a legal duty pursuant to the Family Code. The word "qualified" was removed as it is presumed a provider is qualified to provide IHSS. The definition of a provider who does have a legal duty pursuant to the Family Code was expanded.

Factual Basis:

This language is necessary to clarify the Department's policy on suitable providers and is consistent with WIC section 12300(e) for determining when a person having a legal duty pursuant to the Family Code must leave full-time employment or is prevented from obtaining full-time employment.

Sections 30-763.453 through .453(c)

Specific Purpose:

The existing regulations create significant inconsistencies concerning the allocation of IHSS hours in two-parent homes; therefore, the existing regulation Sections 30-763.453 through .453(c) are repealed. The Director's Alternate Decision invalidated Section 30-763.453(c).

Factual Basis:

The Director's Alternative Decision invalidated Section 30-763.453(c) of the current regulations; therefore, repealing this regulation is necessary to be consistent with the Director's Alternate Decision and WIC section 12300(e). Government Code section 11342.2 states that no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. The California Supreme Court held that the Director of CDSS need not apply nor enforce invalid regulations in state hearing decisions (*Woods v Superior Court of Butte County* (1981) 28 Cal.3d 668, 170 Cal.Rptr. 484, 620 P.2d 1032).

Handbook Section 30-763.453

Specific Purpose:

This handbook section provides an example which gives clarity in situations when a parent who quits full-time employment may be paid as an IHSS provider.

Factual Basis:

This handbook section is necessary to provide clarity to the issue of parental employment. It is also necessary to assist in the appropriate application of the revised regulations.

Final Modification:

As a result of testimony received, CDSS decided to amend this example by replacing "...quits..." with "...leaves..." and "...quit..." with "...left..." This language improves the understanding of the example.

Second Final Modification:

As a result of testimony received on the 15-day renote, CDSS decided to further amend this example for clarity by adding "minor" before "child."

Handbook Sections 30-763.454 through .454(b)

Specific Purpose:

The current regulations do not provide examples of how parental work situations might impact IHSS for minor recipients living with their parent(s). The absence of examples results in inconsistent application and questions from counties. The proposed handbook examples provide clarity concerning qualifications to be a parent provider in two-parent homes.

Factual Basis:

This section states for a parent to be a paid provider, conditions under Section 30-763.45, must be met. The handbook examples are necessary to provide clear examples and Department direction for counties to apply the regulations to case situations.

Final Modification:

As a result of testimony received, CDSS decided to make clarifying changes to the handbook examples provided in these sections. The clarifying changes improve the understanding of the examples.

Second Final Modification:

As a result of testimony received on the 15-day renote, CDSS decided to make one more clarifying change to Handbook section 30-763.454(a) by replacing "her" with "his/her."

Section 30-763.455

Specific Purpose:

The regulation states IHSS hours should not be deducted from a minor recipient's case due to the presence of a non-parent provider when the provider parent meets the criteria in Section 30-763.451.

Factual Basis:

This language is necessary to clarify the invalidation of Section 30-763.453(c) and is consistent with WIC section 12300(e).

The Director's Alternate Decision invalidated 30-763.453(c), as the current regulations did not reflect statutory language. Government Code section 11342.2 states that no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. The California Supreme Court held that the Director of CDSS need not apply nor enforce invalid regulations in state hearing decisions (*Woods v Superior Court of Butte County* (1981) 28 Cal.3d 668, 170 Cal.Rptr. 484, 620 P.2d 1032).

Final Modification:

As a result of testimony received, CDSS decided to further amend this section by replacing "...another..." with "...the other..." This is a clarifying change and does not change the intention of the regulation.

Section 30-763.456(c)

Specific Purpose:

Current Section 30-763.454 is renumbered to 30-763-456 to accommodate the adoption of new sections. Regulation Section 30-763.456(c) clarifies that IHSS does not provide "assistance" to health-related appointments or alternative resource sites; however, IHSS does provide accompaniment to health-related appointments or alternative resource sites. The use of the word "assistance" has a broad impact and may imply a requirement to provide transportation for recipients.

Factual Basis:

This change is necessary to provide clarity concerning medical accompaniment and is consistent the Department's policy and WIC sections 12300(b) and 12300(e)(3).

Section 30-763.456(e)

Specific Purpose:

This regulation was revised by removing the word "that" and replacing it with "protective supervision."

Factual Basis:

This language is necessary to provide clarity and is consistent with WIC 12300(e)(4).

Final Modification:

As a result of testimony received on the 15-day renote, CDSS decided to switch the order of Sections 30-763.456(d) and (e).

Section 30-763.457

Specific Purpose:

The addition of this regulation provides clear direction concerning the Personal Care Services Program (PCSP).

Factual Basis:

The language is necessary to clarify PCSP regulations and is consistent with statute. Under WIC section 14132.95(f), family members, including parents, are not eligible to provide PCSP.

Final Modification:

As a result of testimony received, CDSS decided to further amend this section by adding "...IHSS..." before providers and "...to their minor child under..." after. This is a clarifying change and does not change the intention of the regulation.

b) Identification of Documents Upon Which Department Is Relying

WIC sections 12300(b) and (e) and WIC section 14132.95(f)
Government Code section 11342.2

c) Local Mandate Statement

These regulations impose a mandate on local IHSS agencies, but not on school districts. There are no "State-mandated local costs" in these regulations that require State reimbursement under Section 17500 et. seq. of the Government Code because any costs associated with the implementation of these regulations are costs mandated by the federal government within the meaning of Section 17513 of the Government Code.

d) Statement of Alternatives Considered

In developing this regulatory action, CDSS did not consider any other alternatives because no other practical alternatives exist.

The CDSS has determined that no reasonable alternative considered or that has otherwise been identified and brought to the attention of CDSS would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective as and less burdensome to affected private persons than the proposed action or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

e) Statement of Significant Adverse Economic Impact On Business

The CDSS has determined that the proposed action will not have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This determination was made because this action only pertains to eligibility determinations for IHSS with no significant fiscal effects.

f) Economic Impact Assessment

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

The benefits of the regulatory action to the health and welfare of California residents, worker safety and the state's environment are as follows: These amendments will improve the health and welfare of California residents by increasing the overall IHSS program integrity in assessing the eligibility of applicants and recipients.

WIC sections 12300(b) and (e), 14132.95(f) and Government Code section 11342.2, are the documents relied upon in proposing the regulatory action.

g) Benefits Anticipated from Regulatory Action

This regulatory action will benefit IHSS applicants and recipients by enabling them to consistently receive IHSS eligibility determinations that are uniform with regulatory and

statutory guidelines. The proposed regulations also benefit counties by providing greater clarity in the application of regulations concerning minor IHSS recipients. In addition, the regulatory updates should provide greater guidance to parents, counties, Administrative Law Judges and other stakeholders.

h) Statement of Specific Technology or Equipment

This regulatory action will not mandate the use of new, specific technologies or equipment.

i) Testimony and Response

These regulations were considered as Item #1 at the public hearing held on December 4, 2013, in Sacramento, California. Written testimony was received during the 45-day comment period from October 18, to 5:00 p.m. December 4, 2013. The comments received and the Department's responses to those comments follow.

County Welfare Directors Association of California, (Diana Boyer, Senior Policy Analyst) submitted the following comments (Comments #1 – 6).

Section 30-763.44

1. Comment:

Please provide examples of the following scenarios:

- Scenario described in 30-763.441
- Scenario described in 30-763.444
- Both parents are employed full-time. Can the regulations specify if a child in this living situation is eligible to IHSS?
- The care for an IHSS-eligible child is provided by an undocumented parent.

Response:

The CDSS thanks the testifier for the comments.

- **Including a specific factual scenario describing the application of Section .441 goes beyond the limited purpose of this regulation section and will not be incorporated. The CDSS will consider including examples when the regulations are distributed to the counties for implementation.**
- **Including a specific factual scenario describing the application of Section .444 goes beyond the limited purpose of this regulation section and will not be incorporated. The CDSS will consider including examples when the regulations are distributed to the counties for implementation.**
- **Whether one or both parents are working full-time does not affect a child's eligibility for IHSS. Recipient eligibility is not the subject of this regulation section and will not be incorporated. The CDSS will consider including examples when the regulations are distributed to the counties for implementation.**

- **Including a specific factual scenario regarding a parent's immigration status goes beyond the limited purpose of this regulation section. The comment will not be incorporated. The CDSS will consider including examples when the regulations are distributed to the counties for implementation.**

2. Comment:

Please provide instructions on how the eight hours per week described in 30-763.444 must be entered into CMIPS II.

Response:

The CDSS thanks the testifier for the comment.

- **Instructions on how to enter up to eight hours per week as described in Section 30-763.444 into CMIPS II goes beyond the limited purpose of this regulation section and providing such instructions is not appropriate to include in the regulation package. The comment will not be incorporated. The CDSS will consider providing instructions when the regulations are distributed to the counties for implementation.**

Section 30-763.45

3. Comment:

The statement "...the inability of the provider to perform supportive services may result..." in 30-763.451(a) is inconsistent with the preceding statement which indicates that there is no other suitable provider. Should this read "...the unavailability of a provider to perform supportive services may result..." instead?

Response:

The CDSS thanks the testifier for the comment. The CDSS believes that the testifier was referring to language that was previously .451(a) but was changed to .451 in the proposed regulations, because the proposed Section .451(a) does not include the statement quoted by the testifier. Operating on that assumption, CDSS believes the testifier misinterpreted to whom the term "inability" was meant to refer. In order to prevent further misinterpretation, CDSS has amended this section to clarify that "inability" refers to the parent and not "other suitable provider."

4. Comment:

The new section 30-763.451(a) addresses the parental employment from home by adding "regardless of worksite location." We need additional direction from the State when it comes to the types of employment (regular, part-time, commission-based, self-employed, etc.). One can say s/he works full-time from home on a commission basis.

In this situation, there's no way for the county to verify client's employment and hours worked per day. Consequently, we cannot determine the timeframe when this parent is "unavailable" to provide care even though s/he is home? How do we verify this, by accepting the client's statement? In other programs such as CalWORKs you have to prove that the self-employment or commissions jobs = at least minimum wage and hours related to the job for the purpose of proving child care. The availability seem to be the only relevant factor in IHSS.

Response:

The CDSS thanks the testifier for the comment. Working from home has always been considered a form of parental employment and was included in the proposed regulation only for clarification purposes. Methods of verifying employment are not changed by these regulations. The comment will not be incorporated. The CDSS will consider providing further direction on parental employment verification when the regulations are distributed to the counties for implementation.

5. Comment:

Additional examples would be helpful when it comes to two-parent cases. What happens when both parents work but at different shifts? Do we consider both "unavailable" because while one person is at work, the other person needs to sleep/rest? More defined parameters are needed in order for counties to assess the hours correctly.

Response:

The CDSS thanks the testifier for the comment. Several hypothetical scenarios regarding two parent households have been included in the "Handbook" portion of the proposed regulations. However, it is not possible to create an exhaustive list of potential factual scenarios. Accordingly, the comment will not be incorporated. The CDSS will consider providing additional examples when the regulations are distributed to the counties for implementation.

6. Comment:

Section 30-763.451 (a) – Suggest rewording to ensure further clarity regarding worksite location, such as: ...full-time employment means working an average of 35 or more hours per week regardless of worksite location including the home.

Response:

The CDSS thanks the testifier for the comment. Several hypothetical scenarios regarding two parent households have been included in the "Handbook" portion of the proposed regulations. However, it is not possible to create an exhaustive list of potential factual scenarios. Accordingly, the comment will not be

incorporated. The CDSS will consider providing additional examples when the regulations are distributed to the counties for implementation.

Disability Rights California (Charles Wolfinger, Attorney at Law; Sujatha Jagadeesh, Branch Associate Managing Attorney; Daniel Brzovic, Associate Managing Attorney) submitted the following comments (Comments #7 – 10).

Section 30-763.44

7a. Comment:

The criteria for determining when a parent is not available to provide care services cannot be limited to an exhaustive list. The list needs to be illustrative because there is no way to come up with an exhaustive list. Many parents with disabilities are wonderful parents and are physically or mentally unable to perform certain tasks for their children, even when they are physically present. Further, there are a myriad of circumstances where there is a temporary absence of the parent(s) for essential purposes. Their children need IHSS from a third-party provider so their family can stay together.

Response:

The CDSS thanks the testifier for the comment. The testifier's request that a list that is not exhaustive be included in the regulation goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute and will not be incorporated. With the exception of subsection 30-763.444, the purpose of Section 30-763.44 is to allow IHSS to be purchased from a non-parent provider in the limited specified circumstances when a parent must be gone or is unable to provide the needed IHSS services, for significant periods and on a frequent and/or routine basis. A non-exhaustive list, allowing for payment to a non-parent provider for up to eight hours per week when a parent must be absent when providing errands and other essential purposes for the family, is contained in subsection 30-763.444.

7b. Comment:

The need for IHSS in the situation described above is further supported by the longstanding language of Section 30-763.442 that non-parent providers can provide care "if the parent is physically or mentally unable to provide the needed services." If a parent is physically or mentally unable to provide an IHSS service that a child needs and qualifies for, it is nonsensical to require that the parent also be absent when the services are provided. In this situation, the need for the service to be provided by a third-party provider is premised on the parent's inability to provide the service, not on the parent's absence.

Response:

The CDSS thanks the testifier for the comment. The CDSS agrees with the comment, and has revised the regulation language 30-763.44 to clarify that the parent is not required to be absent; rather, the parent must only be unable or unavailable.

7c. Comment:

Furthermore, requiring parental absence can put single parents who work out of the home and have children who need round-the-clock care in an impossible situation. A parent who works all day needs to sleep at night, and she cannot stay awake at night to take care of her child. When she is sleeping at home, she is "physically or mentally unable to provide the needed service" as described in section 30-76.442. She is unavailable.

Response:

The CDSS thanks the testifier for the comment. The suggested regulatory addition goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. The comment will not be incorporated.

7d. Comment:

In attachment A under 30-763.44 we have expressly included as an example of unavailability a parent's need to sleep because our experience has been that many county IHSS social workers do not understand the necessity of sleep for a parent with a child with a severe disability because of the risk to the child from a parent who is sleep deprived.

Response:

The CDSS thanks the testifier for the comment. The suggested regulatory addition goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. The comment will not be incorporated.

7e. Comment:

Similarly one of the parents may be unavailable because unable to perform paramedical tasks which inability impacts other tasks because of the need to intervene at unpredictable periods of time – i.e., the need to monitor a pulse oximeter in order to adjust the amount of oxygen flow or perform suctioning.

Response:

The CDSS thanks the testifier for the comment. The CDSS does not agree with the suggested addition because the reasons cited for when a parent is not able or available to provide paramedical services are sufficiently covered under Section 30-763.441 through 30-763.443 of the proposed regulations. The suggested regulatory addition will not be incorporated.

7f. Comment:

Please see attachment A for a suggested edit to this regulation that clarifies unavailability and that the parental absence requirement does not apply to parents who are physically mentally unable to perform needed services.

We commend DSS for the clarification that parental absence or unavailability because of enrollment in an educational or vocational program or for search for employment is a basis for the provision of IHSS. Our experience in doing IHSS advocacy is that it can be very difficult for our clients to get IHSS on this basis. The clarification is therefore helpful and important.

See our proposed edit to the regulation on this issue in Attachment A. The purpose of this edit is to clarify the parental employment provision.

The following proposed revision was submitted by the testifier as Attachment A: (Corrections were made to reflect the correct language of the proposed regulation. The testifier's proposed revisions in the original document were shown in color, but to make it easier to read in black and white format, the testifier's proposed revisions are in bold and double strike out and double underline.)

30-763 SERVICE AUTHORIZATION (Continued)

30-763

.4 Exception when assessing needs in shared living arrangements: (Continued)

- .44 When the recipient is under eighteen years of age and is living with the recipient's parent(s), who have a legal duty pursuant to the Family Code to provide for the care of his/her child, IHSS may be purchased from a provider other than the parent(s) when no parent is able and available to provide the services ~~**IHSS tasks for services or for comparably essential purposes including, but not limited to,**~~ any of the following reasons, ~~**and services must be provided during the parent(s) absence:**~~

Response:

The CDSS thanks the testifier for the proposed revision.

- **The CDSS has made the suggested edit to replace "...IHSS tasks..." with "...IHSS services..."**

- The testifier's request to add "...comparably essential purposes..." goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. The comment will not be incorporated.
- The CDSS agrees with the comment, and has revised the regulation language in 30-763.44 to clarify that the parent is not required to be absent; rather, the parent must only be unable or unavailable.

~~.4421~~ ~~If the~~ The parent(s) is physically or mentally unable to ~~perform~~ provide the needed IHSS services.

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS agrees with the proposed language revision, and has revised the regulation language in 30 763.442 to include "...IHSS..." in the proposed regulation. However, renumbering the proposed regulations is not necessary, does not provide clarity and will not be incorporated.

.442 The IHSS services must be provided when the parent is absent from the home or is otherwise unavailable for at least one of the following reasons:

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS does not agree with the suggested regulation because the additional language goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. The comment will not be incorporated.

~~.441~~ (a) ~~When the~~ The parent(s) is ~~absent~~ unavailable because of employment, search for employment, or is enrolled in an educational or vocational training for vocational purposes program.

Response:

The CDSS thanks the testifier for the proposed revision. The suggested regulatory addition goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. Additionally, the issue is sufficiently addressed in Section 30-763.444 of the proposed regulations. The suggested regulatory addition will not be incorporated.

~~.443~~ (b) ~~When the~~ The parent is ~~absent~~ unavailable because of on-going medical, dental or other health-related treatment of the parent or a family member.

Response:

The CDSS thanks the testifier for the proposed revision. The suggested regulatory change goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. Additionally, the issue is sufficiently addressed in Section 30-763.443 of the proposed regulations. The suggested regulatory addition will not be incorporated.

(c) The parent is unavailable because of the need to sleep during part of the 24-hour day.

Response:

The CDSS thanks the testifier for the proposed revision. The suggested regulatory change goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. Additionally, the issue is sufficiently addressed in Section 30-763.442. The suggested regulatory addition will not be incorporated.

(d) For a child requiring paramedical services, the parent has not been authorized by a treating clinician to provide the paramedical service or the parent for other reasons is unable to perform an IHSS paramedical service, including because of a lack of necessary skills, or the physical or psychological inability to perform the services.

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS does not agree with the suggested addition because the issue is sufficiently addressed in Section 30-763.442. The suggested regulatory language will not be incorporated.

~~.4443 up to eight hours per week may be authorized for periods w~~When the parent(s) must be absent from the home ~~in order to perform~~ provide shopping and errands essential to the family, ~~search for employment,~~ or for essential purposes related to the care of the recipient's ~~minor~~ siblings ~~who are minors or~~ **comparably essential purposes**, IHSS may be purchased from a provider other than the parent(s) for up to eight hours per week to perform IHSS tasks necessary during the parent(s) absence. **The 8-hour weekly cap is a presumption subject to rebuttal by establishing the need for additional hours to address an essential purpose.**

Response:

The CDSS thanks the testifier for the proposed revision.

- The renumbering of the proposed regulations is not necessary, does not provide clarity, and will not be incorporated.
- The addition of "...or comparably essential purposes..." and "...8-hour weekly cap is a presumption subject to rebuttal by establishing the need for additional hours..." will increase confusion and ambiguity about this regulation, goes beyond the limited purposes of this regulation section and exceeds the scope of the applicable statute. The suggested regulatory language will not be incorporated.
- The CDSS has amended Section 30-763.444 to add clarity by deleting "...absent from the home in order..." and replacing it with "...unavailable..." and removing the term "...absence..." and replacing it with "...unavailability..."

Section 30-763.451(a)

8. Comment:

As reflected in our proposed edited version of this subsection, the proposed limiting language is inconsistent with the language and purposes of Section 12300(e) and the *Basden* court's determinations. The purposes of not only Section 12300(e) but also the inclusion of institutional deeming in both the DD waiver and the skilled nursing facility waiver administered by DHCS' IHO underscores the Legislature's continuing emphasis on the importance of the parent-child relationship for children with severe disabilities and the stability of the family particularly where there is only one parent in the home. For instance, for a parent who has or could have worked two jobs to support their family, full-time employment includes both jobs. An inability to maintain both jobs because of the child's disability related care needs means that a parent is unable to work full-time and therefore would be found eligible to be the child's IHSS provider.

The following proposed revision was submitted by the testifier as Attachment A: (Corrections were made to reflect the correct language of the proposed regulation. The testifier's proposed revisions in the original document were shown in color, but to make it easier to read in black and white format, the testifier's proposed revisions are in bold and double strike out and double underline.)

- .45 When the recipient is under eighteen years of age and is living with the recipient's parent(s), who have a legal duty under the Family Code to provide for the care of his/her child, the IHSS specified in Section 30-763.456 may be purchased from a parent under the following conditions:

.451 ~~All of the following conditions shall be met:~~

- (a) The parent has left full-time employment or is prevented from obtaining full-time employment because ~~of the need to provide IHSS to the child;~~ no other suitable provider is available and the inability of the provider to perform supportive services may result in inappropriate placement or inadequate care.

- (a) ~~For the purposes of this section, full-time employment means, regardless of job site location, includes working an average of at least 35 or more hours per week regardless of worksite location or giving up or being prevented from working more than 35 hours per week.~~
- (b) ~~There is no other suitable provider available;~~
- (c) ~~If the child does not receive the listed services the child may inappropriately require out of home placement or may receive inadequate care.~~

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS does not agree with the proposed revisions as they exceed the scope of the applicable statute. The suggested regulatory language will not be incorporated.

.452 For the purposes of Section 30-763.451(b), a suitable provider is any person, ~~other than the recipient's parent(s), who is willing, able, and available, and qualified to provide the needed IHSS. A suitable provider who is a person having with~~ a duty pursuant to the Family Code need only be able and available to provide the needed IHSS; ~~the person, and is only considered to be unavailable, if that unavailability occurs during a time the recipient must normally receives a specific service, or for the following reasons essential purposes including: employment, enrollment in an educational or vocational training program, or employment searches, a sibling's hospitalization, a funeral, religious activities, sleeping some portion of the day, visiting a relative or sibling who cannot visit the parent provider because of disability or institutionalization or in hospice.~~

Response:

The CDSS thanks the testifier for the proposed revision.

- The suggested regulatory edit goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute. The suggested regulatory language will not be incorporated.
- The CDSS does not believe the change would add clarity to the definition of suitable provider. The suggested regulatory language will not be incorporated.
- Under 30-763.444 of the proposed regulations, CDSS added "search for employment" as a reason a non-parent provider could be paid to complete IHSS services that must be completed for the minor recipient for up to eight hours a week. The suggested regulatory language is unnecessary and exceeds the applicable statutory language. The suggested regulatory language will not be incorporated.

- Circumstances concerning parental illness and incapacity are already addressed under 30-763.442 and 30-763.443. The suggested regulatory language will not be incorporated, as it goes beyond the limited purpose of this regulation section and exceeds the scope of the applicable statute.

Section 30-763.453

9. Comment:

We commend DSS for deleting this regulation. DSS is correct that the prior regulation resulted in inconsistencies concerning IHSS in two-parent families.

The following proposed revision was submitted by the testifier as Attachment A: (Corrections were made to reflect the correct language of the proposed regulation. The testifier's proposed revisions in the original document were shown in color, but to make it easier to read in black and white format, the testifier's proposed revisions are in bold and double strike out and double underline.)

~~.453 When both parents are in the home, a parent may receive a payment as an IHSS provider only under the following conditions:~~

- ~~(a) The conditions specified in Sections 30-763.451(a) through (c) shall be met.~~
- ~~(b) The nonprovider parent shall be unable to provide the services because he/she is absent because of employment or in order to secure education as specified in Section 30-763.441, or is physically or mentally unable to provide the services, as specified in Section 30-763.442.~~
- ~~(c) If the nonprovider parent is unable to provide services because he/she is absent for employment or educational purposes, payment shall be made to the provider parent only for services which are normally provided during the periods of the nonprovider parent's absence as indicated above.~~

HANDBOOK BEGINS HERE

~~.453 Example: When Bboth parents are employed full-time and. Their child is eligible to receive IHSS. One parent quits his full-time job in order employment to provide IHSS to the child; the other parent retains full time employment. If, and the other requirements in Section 30-763.451 are met, IHSS may be purchased from the parent who quit his job since he left full-time employment to provide IHSS to the child.~~

Response:

The CDSS thanks the testifier for the proposed revision.

- The CDSS agrees with the proposed revision, to change "quit" to "left" to be consistent with the language of the applicable statute and other areas of this regulation package. The CDSS has revised the example accordingly.
- Other revisions are suggestions in sentence structure and will not be incorporated.

.454 Example: When One parent is employed full-time, and the other parent, who has never been employed, is at home, and is able and available to provide IHSS.

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS agrees with the proposed revision, to add "When...", "...and...", and "...who..." and deleting "...and is..." to be consistent with language of the applicable statute and other areas of this regulation package and has revised the example accordingly.

- (a) ~~If When~~ the employed parent ~~quit her job left full-time employment~~ to provide IHSS to ~~her the~~ child, ~~IHSS could not be purchased from~~ that parent ~~since may not be paid as a provider when~~ the conditions ~~pursuant to Section of~~ Section 30-763.451 are not met because the other parent is a suitable provider unless the child requires two providers.

Response:

The CDSS thanks the testifier for the proposed revision.

- The CDSS agrees with the proposed revision to change "quit" to "left" to be consistent with the language of the applicable statute and other areas of this regulation package and revised the example accordingly.
- The CDSS agrees with the proposed revision to change "If..." to "When..." and has revised the example accordingly.
- Other proposed revisions exceed the scope of the applicable statute and will not be incorporated.

- (b) ~~However, if the working~~ When the employed parent did not ~~quit her job leave full-time employment,~~ the non-working parent may ~~qualify be paid~~ as a ~~paid~~ provider ~~only if that parent is when~~ prevented from obtaining full-time employment ~~in order~~ to provide IHSS to the child and ~~the~~ other requirements ~~pursuant to of~~ Section 30-763.451 are met. ~~If the non-working~~ When that parent cannot be employed full-time for

reasons other than the need to provide IHSS to the child, the ~~non-working~~ parent ~~does not qualify as a~~ may not be paid as a provider.

HANDBOOK ENDS HERE

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS agrees with the proposed revision and has revised the example to make the following changes: delete "However, if the working..." and replace it with "When the employed..." replace "...quit her job..." with "...leave full-time employment..." The CDSS agrees to replace "...If the non-working parent..." with "...When the non-working parent..." All other proposed revisions will not be incorporated.

Section 30-763.455 et seq.

10. Comment:

Thank you for clarifying that parent providers can be paid regardless of the presence of the other parent in the home. See our proposed edit to these regulations in Attachment A. We offer the edit for the sake of clarity.

Thank you for considering Disability Rights California's input regarding these proposed regulations. We urge you to make the recommended changes before issuing final regulations.

The following proposed revision was submitted by the testifier as Attachment A: (Corrections were made to reflect the correct language of the proposed regulation. The testifier's proposed revisions in the original document were shown in color, but to make it easier to read in black and white format, the testifier's proposed revisions are in bold and double strike out and double underline.)

.455 A parent provider who meets the requirements in Section 30-763.45~~12~~, shall be paid for performing authorized services regardless of the presence of ~~the~~ another parent in the home, including non-work hours, weekends, and holidays.

Response:

The CDSS thanks the testifier for the proposed revision.

- The CDSS agrees with the proposed revision, to add "...the other ..." and has revised the regulation.
- The requested change to the regulation section number will not be incorporated. As other section numbers have been changed, such a change would make the reference inaccurate.

.4546 The IHSS provided shall be limited to:

- (a) Related services, as specified in Section 30-757.13.
- (b) Personal care services, as specified in Section 30- 757.14.
- (c) ~~Assistance with travel, as specified in Section 30 757.15~~
Accompaniment when needed during necessary travel to health-related appointments or to alternative resource sites **as specified in Section 30-757.15.**

Response:

The CDSS thanks the testifier for the proposed revision. This proposed revision is not necessary because the regulation section as currently written is consistent with the applicable statutory language. The proposed regulatory language will not be incorporated.

- (d) Paramedical services, as specified in Section 30-757.19.
- (e) Protective supervision, as specified in Section 30-757.17, limited to ~~that~~ protective supervision needed because of the functional limitations of the recipient. This service shall not include routine child care or supervision.

.457 A recipient's parent(s) are not eligible to be **IHSS** providers ~~for~~ **to a minor child under** the Personal Care Services Program pursuant to Welfare and Institutions Code Section 14132.95(f).

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS agrees with the proposed revision and has revised the regulation to add "...IHSS..." and "...to their minor child under..." the testifier's suggestion of adding "...to a minor child..." is unnecessary and will not be incorporated.

.46 (Continued)

Authority cited: Sections 10553 and 10554, Welfare and Institutions Code; and Assembly Bill 1773, Chapter 939, Statutes of 1992.

Reference: Sections 12300, 12309, and 14132.952, Welfare and Institutions Code; and the State Plan Amendment, approved pursuant to Section 14132.952(b), Welfare and Institutions Code; Section 11342.2, Government Code; and Miller v. Woods/Community Services for the Disabled v. Woods, Superior Court, San Diego County, Case Numbers 468192 and 472068, **148 Cal.App.3d 862 (1983); Basden v. Wagner, 181 CalApp.4th 929 (2010).**

Response:

The CDSS thanks the testifier for the proposed revision to the reference section. The CDSS agrees to add the additional citation to the *Miller v. Woods* case: "148 Cal.App.3d 862." The citation to *Basden v. Wagner* is unnecessary and will not be added.

j) 15-Day Renotice Statement

Pursuant to Government Code Section 11346.8, a 15-day renotice and complete text of modifications made to the regulations were made available to the public following the public hearing. Written testimony on the modifications renoticed for public comment from April 24 to May 12, 2014 was received. The comments received and the Department's responses to those comments follow.

Riverside County Department of Public Social Services, In-Home Supportive Services, Public Authority (Jennifer L. de la Ossa-Ramirez, Ph.D., Senior Administrative Analyst) submitted the following comments (Comments # 1 – 11)

Section 30-763.44

1. Comment:

From regulations document:

Regarding "Family Code" – Suggest to: include precise code number/citation upon this initial reference to "Family Code" and in the *Reference* section (page 4 of this document), given that said Family Code serves in large part, as the basis for amendments to Section 30-763.4.

From final statement of reasons document, section b):

Suggest to: also include number/citation of "Family Code" which served in large part as the basis for amendments to Section 30-763.4.

From final statement of reasons document, in regards to the reference citations at the end of the regulation section:

Again, suggest to: also include number/citation of "Family Code" which served in large part as the basis for amendments to Section 30-763.4.

Response:

The CDSS thanks the testifier for the comment. This proposed revision is not necessary because the regulation section as currently written is consistent with the applicable statutory language. The suggested regulatory addition will not be incorporated.

2. Comment:

From regulations document:

Regarding "IHSS ~~tasks~~ services" – While the source for the change from "IHSS Tasks" to "IHSS Services" is understood from the *Final Statement of Reasons* document, the resulting naming convention is redundant: IHSS Services = **In-Home Supportive Services Services**.

Suggest to: maintain current "IHSS Tasks" nomenclature.

From final statement of reasons document, Final Modification to Section 30-763.44:

While it is understood that the change from "IHSS Tasks" to "IHSS Services" reflects CDSS' effort to be responsive to testimony received, the resulting naming convention is redundant: IHSS Services = **In-Home Supportive Services Services**.

Suggest to: maintain current "IHSS Tasks" nomenclature.

Response:

The CDSS thanks the testifier for the proposed revision. This proposed revision is not necessary because the language as written is commonly used to describe IHSS services. The proposed regulatory language will not be incorporated.

3. Comment:

Regarding "inability and/or unavailability" – "and/or" vs "or" to mimic above reference to able and available...

Response:

The CDSS thanks the testifier for the proposed revision. This proposed revision is not necessary because the language as written provides clearer direction that the parent can be either unable or unavailable. The proposed regulatory language will not be incorporated.

Section 30-763.451(a)

4. Comment:

Regarding "or ~~35~~ of 40" – Suggest to: make mention of Labor Code sections 510, 511, and 515(c) that (although not controlling) serve as the source reference for a 40-hour work week.

Response:

The CDSS thanks the testifier for the proposed revision. The reason CDSS cites the Labor Code is to establish a rational basis for the definition of full time employment, but those labor code sections are not controlling and specific to the

definition of full-time parental employment for IHSS purposes. The proposed regulatory language will not be incorporated.

Section 30-763.452

5. Comment:

Regarding "... if that unavailability occurs during a time the **recipient** must receive a specific service..." – Confusing... recipient or provider?

Response:

The CDSS thanks the testifier for the proposed revision. This proposed revision is not necessary because the context refers to the receipt of services, which can only be by a recipient and not a provider. The proposed regulatory language will not be incorporated.

Handbook Sections 30-763.453 and .454

6. Comment:

From regulations document:

Regarding "Example" – While the source for inclusion of Examples in the Handbook is understood from the *Final Statement of Reasons* document as CDSS' response to a testifier's request, the Examples are *orphaned* in the Handbook insomuch as they are not preceded by a guiding a policy/regulatory position statement.

Suggest to: lead into each handbook section Example with a regulation statement.

From final statement of reasons document, section i), response to Comment 1.:

Suggest to: lead into each handbook section Example with a regulatory position statement rather than open a section with an Example.

Response:

The CDSS thanks the testifier for the proposed revision. This proposed revision is not necessary because the Handbook sections on parental employment and full-time employment follow the parental employment and full-time employment sections. The proposed regulatory language will not be incorporated.

Handbook Section 30-763.453

7. Comment:

Regarding "Their **child** is eligible to receive IHSS." – Usage of child vs. minor...

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS agrees with the proposed revision and has revised the regulation to add "minor" before "child."

Handbook Section 30-763.454(a)

8. Comment:

Regarding "When the employed parent left **her** job..." – his/her.

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS agrees with the proposed revision and has revised the example by adding "his/" before "her" in both areas.

9. Comment:

Regarding "**Section Section** 30-763.451..." – repeated.

Response:

The CDSS thanks the testifier for the comment. The CDSS has deleted the duplicate word.

Handbook Section 30-763.454(b)

10. Comment:

Regarding "When **the the** non-working parent..." – repeated.

Response:

The CDSS thanks the testifier for the comment. The CDSS has deleted the duplicate word.

Section 30-763.456(d) and (e)

11. Comment:

Regarding the order of sections (d) and (e) – switch the order.

Response:

The CDSS thanks the testifier for the proposed revision. The CDSS agrees with the proposed revision and has revised the regulation to switch the current order of Manual of Policies and Procedures (MPP) Sections 30-763.456(d) and 30-763.456(e). This change is consistent with the WIC section 12300(e).

Disability Rights California (Charles Wolfinger, Attorney at Law; Sujatha Jagadeesh, Branch Associate Managing Attorney; Daniel Brzovic, Associate Managing Attorney) submitted the following comment (Comment #12).

Section 30-763.451(a)

12. Comment:

1. Background: Our Initial Comments On The Proposed Exclusive 35 Hours Per Week Test For "full-time employment" In MPP Section 30-763.451(a)

The original proposed section read: "For purposes of this section, full-time employment means working an average or [sic] 35 hours per week regardless of work location."

Our initial comment was that this definition limited the statutory terms "full-time employment" in section 12300, subd. (e) (Welf. & Inst. Code) of the In-Home Supportive Services Program (IHSS) to this 35 hour per week test and excludes parents who decided to work under different circumstances to support their families and their children with disabilities needing IHSS services.¹ For example, we noted that it excludes parents working more than 35 hours per week providing IHSS services to one disabled child from providing IHSS services to a second disabled child. The Court of Appeal in *Basden v. Wagner* (2010) 181 Cal.App.4th 929, 931, described that exclusion as "nonsensical" in concluding it was inconsistent with the purposes of section 12300, subd. (e). In place of the exclusive test, we recommended rephrasing the regulation as one example of "full-time employment" as follows: "(a) For purposes of this section, full-time employment, regardless of worksite location, includes working an average of at least 35 hours per week or giving up or being prevented from working more than 35 hours per week." (Emphasis added.)

2. Notification Of 15-Day Public Availability Of Changes to Regulations

2.1 Final Statement Of Reasons for new MPP section 30-763.451(a)

On April 24, 2014, you issued changes to MPP section 30-763.451(a). In the Final Statement of Reasons (FSR), you describe the "Specific Purpose" for amending it as:

¹ For convenience, all references to "children" in these comments refers to children with disabilities needing IHSS services.

There is no current regulation to specifically address when a parent is considered employed full-time for the purposes described in WIC section 12300(e). Amending the regulations to provide this definition will allow consistent application of 30-763.451. (FSR, 4.)

You describe the "Factual Basis" as: "The language is necessary to clarify full-time employment to be consistent with the Department's policy." (FSR, 4.)

You describe the "Final Modification" since the initial comment period as:

As a result of further consideration, the Department decided to amend this section. This section is amended from ". . . average of 35 hours or more per week. . ." to ". . . average of 40 hours or more per week. . ." This modification will allow parents who are working an average of less than 40 hours per week due to care needs of their child, to be potentially eligible to the IHSS provider for their child. This modification will make the regulation consistent with Labor Code sections 510, 511, and 515(c), all of which refer to a 40 hour work week as full-time employment, and the intent of WIC 12300(e), which is to allow payment to parents who have had to forfeit full-time employment in order to care for their disabled child. (FSR, 4.)

2.2 The Final Statement Of Reasons to the final changes to MPP section 30-763.451(a), are factually and legally incorrect in every respect.

2.2.1 The current regulation, in effect since 1979, specifies that the terms "full-time employment" are open ended like the statute.

You state: "There is no current regulation to specifically address when a parent is considered employed full-time for the purposes described in WIC section 12300(e)." (FSR, 4.) Wrong.

The current regulation, MPP § 30-763.451(a), in effect since the parent provider provision was enacted in 1979 (Stats.1979, c. 1059, § 2; Part 3.2 below), provides:

The parent has left full-time employment or is prevented from obtaining full-time employment because of the need to provide IHSS to the child.

The current regulation does "specifically address when the parent is employed full-time" because it adheres to the broad, open-ended language of "full-time employment" in section 12300, subd. (e). That has been the agency's interpretation for 35 years.

You assume, without any factual or legal analysis, that the broad, open-ended statutory terms "full-time employment" do not "specifically address when the parent is employed full-time." Every factual and legal analysis of section 12300, subd. (e) shows that the broad, open-ended interpretation of the terms "full-time employment" were the specific

intent of the Legislature for carrying out the purpose of the statute. (Parts 3,2; 3.4.2 below.)

2.2.2 The proposed exclusive 40 hours per week amendment will consistently impose a restrictive, exclusive test for "full-time employment."

You state: "Amending the regulations to provide this definition will allow consistent application of 30-763.451." (FSR, 6) True but illegal.

The proposed amendment to MPP § 30-763.451(a) defining "full-time employment as "working an average of 40 or more hours per week", imposes a very restrictive because exclusive test, which, applied "consistently," excludes many parents, who may now provide IHSS services to their children them under the current and longstanding, broad open-ended test in the regulations that tracks the language of section 12300, subd. (e). (Part 3.2 below.) The amendment is "consistent" but only in the sense that it applies a single exclusive test of eligibility for all parent providers, which is illegal (Part 3 below), in place of the longstanding and current broad open ended test.

2.3.3. CDSS's only policy since 1979 has been a broad, open-ended test for "full-time employment" in its regulation.

You state the "Factual Basis" for the proposed regulation as: "The language is necessary to clarify full-time employment to be consistent with the Department's policy." (FSR, 4.) Wrong.

The only CDSS policy for interpreting "full-time employment" in section 12300, subd. (e), has been set out for 35 years in its contemporaneous, longstanding and current regulation. (Part 3.3 below.) That policy follows the broad, open-ended test of the statutory terms to implement what the Legislature intended. You cite no other CDSS policy.

Mr. Wolfinger has won several lawsuits against CDSS over the issues of whether "full-time employment" applies to parents' employment situation otherwise excluded by the proposed exclusive 40 hours per week test. (*E.g.*, *Basden*, supra, 181 Cal.App.4th at 941-42; *Giese v. Wagner*, Sacramento NO. 34-2010-80000681; 34-2012-80001076, Stipulation For Entry Of Judgment And Judgment Granting Peremptory Writ of Mandate, filed 2/20/13 (Register of Actions (ROA) Nos. 18, 19.)

2.2.4 The modification is unnecessary for any parent to meet the "full-time employment" condition of the statute and the current regulation.

You state: "This modification will allow parents who are working an average of less than 40 hours per week due to care needs of their child, to be potentially eligible to the IHSS provider for their child." (FSR, 4.) Wrong.

First, the proposed regulation is limited to parents who are working. They may meet the "full-time employment" test regardless of how few hours they are currently working. Working parents do not need any specific minimum weekly hour test to qualify. They may always show that a non-parent provider can work the hours needed to make up the 40 hours between them so the parent could work at least 40 hours a week and so meet the condition of being "prevented from obtaining full-time employment" to provide IHSS services to their children.

Second, the proposed amended regulation is unnecessary for parents who are not working at all, for the same reasons as it unnecessary for parents working less than 40 hours per week.

2.2.5 The overtime provisions of Labor Code are irrelevant.

You state: "This modification will make the regulation consistent with Labor Code sections 510, 511, and 515(c), all of which refer to a 40 hour work week as full-time employment, and the intent of WIC 12300(e), which is to allow payment to parents who have had to forfeit full-time employment in order to care for their disabled child." (FSR, 6.) Wrong.

First, Labor Code sections 510 and 511 specify when the employer must pay one and one-half times the regular rate of pay for an employee. Section 515, subd. (c) provides: "For the purposes of this section, 'full-time employment' means employment in which an employee is employed for 40 hours per week." But section 515, subd. (a) confirms that 40 hours is used only to determine when to pay overtime; it exempts from the overtime test "executive, administrative and professional employees" when certain conditions are met, including earning "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment."

Second, section 12300, subd. (e) nowhere limits "full-time employment" to working 40 hours per week by hourly wage employees referred to in the Labor Code sections. While that is one group of parents who may meet the definition, it is not the only group as the reference to "executive, administrative and professional employees" indicates. Limiting "full-time employment" to the proposed 40 hours per week condition, is totally inconsistent with the purposes of section 12300, subd. (e). (Part 3.4 below.)

2.3 The Testimony and Response No. 6 to comments on the proposed exclusive 35 hours per week test for "full-time employment, is inaccurate and misleading.

In section i) of the Final Statement of Reasons on "Testimony and Response, you state:

Comment:

Section 30-763.451 (a) – Suggest rewording to ensure further clarity regarding worksite location, such as: . . .full-time employment means working an average of 35 or more hours per week regardless of worksite locating including home.

Response:

. . .Several hypothetical scenarios regarding two parent households have been included in the 'Handbook' portion of the proposed regulations. However, it is not possible to create an exhaustive list of potential scenarios. Accordingly, the comment will not be incorporated. The CDSS will consider providing additional examples when the regulations are distributed to the counties for implementation. (FSR, 6.)

The basic point of our comments was that you had replaced the broad, open-ended test for "full-time employment" in section 12300, subd. (e) and in your contemporaneous and longstanding regulation, with a very narrow, exclusive test that limits the terms to one employment situation. You ignored this key comment in your response.

3. The Proposed Exclusive 40 Hours Per Week Test For "full-time employment" In MPP § 30-763.451(a), Is Illegal.

3.1 Standards for evaluating the legality of an agency's interpretation of its governing statutes

Basden, the only appellate decision construing section 12300, subdivision (e), applied the "well-known rules" of statutory interpretation in the Supreme Court's decision in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977, to evaluate CDSS's interpretation of the terms "full-time employment":

When construing a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citation.] The words of the statute are the starting point. "Words used in a statute. . .should be given the meaning they bear in ordinary use. [Citation.] If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. . ." [Citation.] If the language permits more than one reasonable interpretation, however, the court looks "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citation.] After considering these extrinsic aids, we "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.] (*Wilcox, supra*, 21 Cal.4th at 977-78.) (181 Cal.App.4th at 938)

The statutory interpretation issue in *Basden* was whether the terms "prevented from obtaining full-time employment" in section 12300, subdivision (e), made a mother, who was already providing over 40 hours per week, of IHSS services to her son, ineligible to provide IHSS services to her daughter as well. (181 Cal.App.4th at 938-39.) The Director claimed that it did. The court determined that the Director's interpretation undermined the basic purpose of the IHSS program of keeping their children at home with adequate care from their parents:

. . . If plaintiff's mother is disqualified from providing care to plaintiff because she already provides care to Andrew, and no other qualified provider is available to provide care to the plaintiff, then plaintiff will have to be institutionalized to receive the care she requires even though her mother is at home able to provide the care.

* * * *

. . . [N]othing in the statutes [treating the parent as an employee for some purposes] even remotely suggests that the Legislature defined the provision of in home, full time, IHSS-funded care *by a parent to a child* as full-time employment at all, much less to in order to *limit* that parent's eligibility to receive IHSS funding for caring for all of her IHSS-qualified children. (*Id.*, 939-40 [italics in original].)

3.2 The proposed exclusive 40 hours per week test, is inconsistent with the statutory language and legislative history of section 12300, subd. (e).

3.2.1 The statutory language puts no restrictions on the scope on what is "full-time employment."

The "words of the statute are the starting point" in interpreting it. (*Wilcox, supra*, 21 Cal.4th at 977.)

The statutory language in section 12300, subd. (e) does not put any restrictions on "full-time employment," much less limit it to hourly wage employees working at least 40 hours per week as the proposed regulation would do.

CDSS suggests that related statutory language in the Labor Code overtime provisions, supports its exclusive 40 hours per week test. (Part 2.2.5 above.) As the time section 12309 was enacted, while those overtime wage provisions were in effect, the Legislature could have but did not limit "full-time employment" to work that might trigger overtime wages. Instead the most analogous statutory scheme in effect in 1979 was the unemployment compensation program which paid benefits to persons out of "full-time work," who are looking for work in their "usual occupation" or for which they are "reasonably fitted." (Unempl. Ins. Code §§ 1252, subd. (a)(2), 1258.) This scheme covers a far broader range of employment than the Labor Code overtime wage provisions.

However, since the terms "full-time employment" are not clear and unambiguous on the issue of what, if any limitations may be imposed on them, one must turn to other extrinsic aids in statutory interpretation. (*Wilcox, supra*, 21 Cal.4th at 977-78.)

3.2.2 The legislative history of the 1979 statute shows a continual expansion of the conditions under which parents may provide IHSS services to their disabled children.

One extrinsic aid for interpreting the statute is its legislative history. (*Wilcox, supra*, 24 Cal.4th at 977.)

The amendments during the bill history of the parent provider provision in section 12300, subdivision (e) (Stats. 1979, c. 1059 (A.B. 1134) § 2), show that the Legislature broadened the circumstances when parents may be paid to provide IHSS services to their children and imposed no restrictions on what constituted "full-time employment."

A.B. 1134 was introduced March 22, 1979 to clarify what services are available under the IHSS program but contained no provisions about paying parents to provide IHSS services to their disabled children. (Exhibit 5, 1.)²

The April 30, 1979 Assembly amendments added the parent provider provision:

Where such supportive services are provided by a person having a legal duty under the Civil Code to provide for the care of his or her child who is the recipient, such provider of supportive services shall receive remuneration for such services only when the provider leaves employment or is prevented from accepting employment and where the inability of such provider to provide supportive

² CDSS has all the legislative history materials cited in these comments. They are attached as exhibits to the Request For Judicial Notice And Notice Of Lodgment Of Exhibits 1-10 (Request) in the *Wiley v. Lightbourne* litigation (Sacramento Superior Court No. 34-2011-80000959, filed 3/8/13. (Register Of Actions (ROA) No. 23.) "Exhibit 5, 1" refers Exhibit 5, page 1 in the consecutively paginated bill history of A.B. 1134 attached to that Request. All further citations to exhibits and pages numbers are to the exhibits attached to that Request.

Wiley is another case litigated by Mr. Wolfinger after the Director imposed a restrictive test for "full-time employment" in a hearing decision. The Director determined that neither parent may be paid to provide IHSS services after requiring them to work away from home at different hours from each other so that one parent would always be at home, so that neither may meet the "no other suitable provider" condition in section 12300, subd. (e) to be paid. After filing the opening brief making the same statutory arguments as in *Basden* and *Giese*, the Director stipulated to a judgment setting aside his hearing decision; finding one parent may provide IHSS services; and paying back wages with interest from the effective date of the initial denial to the parent provider. (Stipulation For Entry Of Judgment Granting Peremptory Writ Of Mandate And Judgment, filed 1/10/14 (ROA No. 24).)

services will result in inappropriate, out-of-home placement. (Ex. 5, 6 [italics in original to indicate the amendment that date].)

This initial version required parent providers to prove that they had a job offer and that their children will be institutionalized if they were not their IHSS providers.

The May 30, 1979 Assembly amendments to the parent provider provision added "full time" before employment; changed "accepting" to "obtaining" and "will result" to "may result;" deleted "out-of home" before placement; and added "or inadequate care" after placement. As amended it read:

Where such supportive services are provided by a person having a legal duty under the Civil Code to provide for the care of his or her child who is the recipient, such provider of supportive services shall receive remuneration for such services only when the provider leaves full time employment or is prevented from *obtaining* full time employment and where the inability of such provider to provide supportive services *may* result in inappropriate placement *or inadequate care.* (Ex. 5, 9 [italics in original to indicate the amendment].)

These amendments broadened the circumstances when parents may be paid to provide IHSS services to their children. They allowed parents to be IHSS providers and keep a part-time jobs by requiring only that they give up or cannot obtain "full-time employment."³ They did not require parents to prove they had a job offer they could not accept but only that they could not work full-time and care for their children. They did not require parents to show that their children will be institutionalized if they were not the IHSS provider, but only that their children might otherwise receive "inadequate care. The August 28, 1979 Senate amendments⁴ added "*because no other suitable provider is available. . . .*" after "is prevented from obtaining full time employment." As amended it read:

Where such supportive services are provided by a person having a legal duty under the Civil Code to provide for the care of his or her child who is the recipient, such provider of supportive services shall receive remuneration for such services only when the provider leaves full time employment or is prevented from obtaining full time employment *because no other suitable provider is available* and where the inability of such provider to provide supportive services may result in

³ CDSS recently interpreted section 12300, subdivision (e) and its regulations to allow a parent to work part-time while paid to provide IHSS services to her child. (ACIN No. I-28-06, Question 6 (2006).)

⁴ A.B. 1134 was amended in the Assembly on June 25, 1979 (Ex. 6, 10-12) and in the Senate on July 17 (Ex. 6, 13-16), without any changes to the parent provider provision. It was amended in the Senate on August 21 by adding a second paragraph specifying what IHSS services parents may be paid to provide (Ex. 6, 20) but did change the language of the first paragraph on the conditions for paying parents to provide them.

inappropriate placement or inadequate care. (Ex. 6, 23 [italics in original to indicate the amendment that date].)

This amendment was in response to an objection from CDSS that the parent provider provision would allow one parent to provide IHSS to a child when the other parent "resides in the household and is available to provide the services." (Ex. 8, 1.) It proposed eliminating IHSS to a parent provider in a two-parent household altogether: the parent provider provision ". . . should be revised to restrict compensation of IHSS providers to situations where only one parent resides in the household." (*Id.*, 1-2.) CDSS made no comments on the "full time employment" condition.

CDSS's Enrolled Bill Report on A.B. 1134 stated that the bill would "[s]pecify conditions required for remuneration of a parent providing supportive services" and ". . . would justifiably recompense parents, who are legally bound to provide adequate supportive care, in cases where sufficient suitable providers are not available for the care of their IHSS-eligible children." (Ex. 9, 1-2 [emphasis added].) CDSS explicitly acknowledged that the purpose of the parent provider provision was to expand the supply of suitable providers. (*Ibid.*)

3.3 The proposed exclusive 40 hours per week test, is inconsistent with the contemporaneous and longstanding CDSS interpretation by regulation of the 1979 statute, which left the test for "full-time employment" broad and open-ended.

3.3.1 CDSS's contemporaneous interpretation in the 1979 regulations adopted the "full-time employment" statutory language without any restrictions.

Another extrinsic aid for interpreting a statute is the "contemporaneous administrative construction" of its terms in agency regulations. (*Wilcox, supra*, 24 Cal.4th at 977.)

In transmitting its contemporaneous regulations to implement A.B. 1134 to the counties, CDSS stated: "These revisions to Division 30 regulations implement the requirements of Assembly Bills (AB) 1134 and 1940, Statutes of 1979. The revisions include. . . provisions for the purchase of IHSS from a provider parent under specific circumstances. . . ." (CDSS Manual Letter No. 79-72, 1 (1/7/80) [emphasis added].) The regulations imposed no restrictions on the circumstances that constitute "full-time employment."

The regulation incorporated the same broad, open-ended "full-time employment" terms that were in the statute. They contained no other "specified circumstances" (CDSS Manual Letter No. 7972, 1 (1/7/80)) on what constituted "full-time employment" than these broad, open-ended terms.

In sum CDSS's contemporaneous regulation interpreting and implementing the "requirements" of the parent provider provision in section 12300, subdivision (e),

contained no "specified circumstances" restricting what constituted "full-time employment." (CDSS Manual Letter No. 79-72, 1 (1/7/80).)

3.3.2 CDSS's longstanding interpretation of "full-time employment" in its regulations from 1979 to 2014, never changed its contemporaneous interpretation of them.

A related extrinsic aid to the contemporaneous agency interpretation of a statute, is legislative acquiescence in an agency's longstanding interpretation in regulations by not amending the statute. (*Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 351-52.)

Except for renumbering the contemporaneous regulation, CDSS has not changed their terms in 35 years. (*Cf.* MPP § 30-463.245 (1979) *with* MPP § 30-763.451.)

The Legislature has amended section 12300, subdivision (e) twice since 1979, in 1992 to substitute "Family Code" for "Civil Code" (Stats. 1992, c. 162, § 36) and in 2002 to redesignate it as subdivision (e). (Stats. 2002, c. 1088, § 6.) It has never limited the broad, open ended test for "full-time employment" as a condition of paying parents to provide IHSS services to their children. Thus, it has also acquiesced in CDSS's longstanding interpretation of the 1979 legislation to leave the Legislature's 1979 broad, open-ended test in place.

3.4 The proposed exclusive 40 hours per week test, subverts the statutory goal of using a broad, open-ended test for "full-time employment" to cover the wide range of circumstances in which parents decide on how to support their families and care for their children.

3.4.1 Limiting "full-time employment" to hourly wage earners working 40 hours per week, excludes parents who have decided on other kinds of work to raise and support their families and care their children.

The proposed exclusive 40 hours per week test effectively limits "full-time employment" to "fast food" jobs. Although many parents may work such jobs, others have decided to work other types of jobs:

(1) parents who work more than 40 hours per week and can and want to work as their children's IHSS providers so they can support their family (*E.g., Basden*); and

(2) parents who work less than 40 hours per week on a salary and can and want to work as their children's IHSS providers so they can support their family. (*E.g., Giese.*)

CDSS tried to exclude such work but lost in *Basden* and admitted error in *Giese* under the broad, open-ended "full-time employment" test in the statute and its current regulation.

The proposed exclusive 40 hours per week test directly interferes with parents' decisions on how to support and raise their children and is invalid. The Legislature was presumed to enact valid legislation. Before it enacted section 12300, subd. (e), two appellate decisions had struck down a provision and an interpretation of the Unemployment Insurance Code for interfering with such parental decisions about raising their families. (*See Sanchez v. Unemployment Insurance Appeals Board* (1979) 30 Cal.3d 50, 69-70; *Boren v. California Dept. of Employment Development* (1976) 59 Cal.App.3d 250, 253, 257.)

3.4.2 Keeping the broad open-ended test for "full-time employment" supports the basic purpose of section 12300, subd. (e) of ensuring adequate care for children needing IHSS services by paying their parents to provide them.

After considering all the extrinsic aids, the court must select an interpretation ". . . promoting rather than defeating the general purpose of the statute. . . ." (*Wilcox, supra*, 21 Cal.4th at 977-78.)

The purpose of section 12300, subdivision (e) is to ensure adequate care for disabled children by paying parents to provide IHSS services to them. "Recipients needing 24-hour protective supervision – and other services – are more likely to receive better continuous care from relatives living with them whose care is more than contractual." (*Miller, supra*, 148 Cal.App.3d at 869, 870.) Under the broad, open-ended test of "full-time employment," parents who otherwise decide on what work to perform so they can support their families, may in addition work as IHSS providers for their children to ensure their adequate care. That decision is part of the bundle of constitutional rights parents have in raising their children (*Wisconsin v. Yoder* (1972) 406 U.S. 205, 232-34), which the exclusive 40 hours per week test interferes with, and for that reason is invalid under the *Sanchez* and *Boren* decisions.

The *Basden* decision illustrates precisely how the open-ended test ensures more parent providers than the proposed exclusive 40 hours per week test. *Basden* expressly rejected the proposed exclusive 40 hour per week test applied to a mother, who was working over 40 hours per week providing IHSS to her son, to prohibit her from providing IHSS to her daughter because it undermined the basic purpose of the IHSS program keeping recipients at home with adequate care and out of institutions:

. . . If plaintiff's mother is disqualified from providing care to plaintiff because she already provides care to Andrew, and no other qualified provider is available to provide care to the plaintiff, then plaintiff will have to be institutionalized to receive the care she requires even though her mother is at home able to provide the care.

* * * *

. . . [N]othing in the statutes [treating the parent as an employee for some purposes] even remotely suggests that the Legislature defined the provision of in-home, full-

time, IHSS-funded care *by a parent to a child* as full-time employment at all, much less to in order to *limit* that parent's eligibility to receive IHSS funding for caring for all of her IHSS-qualified children. (*Id.*, 939-40 [italics in original].)

Conclusion

For these reasons CDSS has no factual and no legal basis for adopting the proposed exclusive 40 hours per week test for "full-time employment." The test is also illegal. Parents of disabled children should not be limited to full-time "fast food" jobs as a condition of providing IHSS services to their children. They can and do decide to work in other ways support and raise their families and care for their children. CDSS should drop the proposed change to MPP section 30-763.451(s) and continue its 35 year interpretation of section 12300, subd. (d) as a broad, open ended test of "full-time employment" as the Legislature intended.

Response:

The CDSS thanks the testifier (Disability Rights California) for the preceding comments. It is within CDSS' statutory authority pursuant to Welfare and Institutions Code sections 10553 and 10554 to define the term "full-time employment" for the purpose of the administration of the IHSS program. Further, CDSS' references to Labor Code sections 510, 511, and 515(c) in the Notification of 15-Day Public Availability of Changes to Regulations did not purport that those statutory sections are controlling for the purpose of the administration of the IHSS program. Rather, the references were included to demonstrate CDSS' rational basis for defining "full-time employment" as working an average of 40 hours or more per week, namely, that elsewhere the legislature has defined the term similarly. Accordingly, the comments will not be incorporated. However, for the purpose of clarification, MPP section 30-763.451(a) has been amended to specify that a parent providing IHSS funded care to his or her own child is not full-time employment.